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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RUDY SANTOS NISSEN,

Defendant and Appellant.

D040430

(Super. Ct. No. SCS165116)

APPEAL from a judgment of the Superior Court of San Diego County, Wesley R. Mason, Judge. After reconsideration following transfer from the California Supreme Court with directions to vacate our prior decision and reconsider the matter in light of *Crawford v. Washington* (2004) \_\_\_ U.S. \_\_\_ (124 S.Ct. 1354) (*Crawford*), we affirm.

A jury found Rudy Santos Nissen guilty of assault with a deadly weapon with force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)),<sup>1</sup> and battery

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

with serious bodily injury (§ 243, subd. (d)). The jury also found true the allegations that in committing those crimes Nissen inflicted great bodily injury (§§ 12022.7, subd. (a), 1192.7, subd. (c)(8)), used a deadly or dangerous weapon (§§ 12022, subd. (b)(1), 1192.7, subd. (c)(23)), and acted in furtherance of a criminal street gang (§ 186.22, subd. (b)(1)). Thereafter, the court found true a prior prison term allegation (§ 667.5, subd. (b)), a prior serious felony conviction (§ 667, subd. (a)(1)), and a prior "strike" conviction (§ 667, subds. (b)-(i)). Nissen was sentenced to a term of 24 years in state prison, consisting of the midterm of three years for the assault conviction, doubled to six years based upon the prior strike conviction, with a consecutive term of three years for the great bodily injury enhancement, a consecutive term of 10 years for the criminal street gang enhancement, and a consecutive term of five years for a prior serious felony enhancement. The sentence on the battery conviction was stayed pursuant to section 654.

On appeal Nissen asserts that (1) the court violated his Sixth Amendment right to confront witnesses by admitting evidence of codefendant Rashad Mann's change of plea;<sup>2</sup> (2) there is insufficient evidence to support the criminal street gang enhancement; (3) the jury instruction on the criminal street gang enhancement was deficient; and (4) the jury instruction under CALJIC No. 17.41.1 was improper. We conclude, based upon the United States Supreme Court's decision in *Crawford, supra*, 124 S.Ct. 1354, that admission of Mann's change of plea form violated the Sixth Amendment confrontation

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<sup>2</sup> Mann was originally charged, together with Nissen, with attempted robbery, assault with a deadly weapon and battery. However, as will be discussed, *post*, he pleaded guilty to assault with a deadly weapon and was not tried with Nissen.

clause of the United States Constitution. However, we also conclude that the error was harmless beyond a reasonable doubt and therefore we need not reverse the judgment on this basis. Further, we reject the remainder of Nissen's contentions and affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

### *A. People's Case*

Armando Franco grew up in Chula Vista until he was 15 years old, when he moved to Imperial Beach with his mother. He associated with an Imperial Beach gang known as the "Imperials" from that time until he moved away when he was 18. Franco was 21 at the time of his testimony at Nissen's trial.

Franco's father was one of the founders of the gang. All of Franco's family members on his father's side were gang members.

Franco was not highly regarded within the gang for a variety of reasons. One was that the majority of members grew up in Imperial Beach and had known each other since elementary school, while Franco had only moved there recently. Another was that he had not been "jumped into" the gang because of the high status of Franco's father in the gang. To be "jumped in" means to be beaten up by other gang members before being admitted. On one occasion Mann, also an Imperial Beach gang member, and three others beat up Franco and a friend and stole his friend's hat and money. Franco told his father about the incident and there was animosity between Franco's family and Mann after that.

Franco's father died as a result of an altercation with a rival gang. A few months after his father's death, Franco went to a party where Mann was present. Mann gave

Franco a "dirty look" and approached him throughout the night, asking him, "Who got your back now?" Franco believed that this was a reference to his father's death and the fact there was no longer anyone to protect him. Franco believed that Mann was angry over Franco telling his father about his prior altercation with Mann.

Franco stopped associating with the gang when he turned 18 years old. In order to leave the gang, individuals usually had to be "jumped out" in the same manner that they entered the gang. Franco did not go through this process and merely left the gang. Franco moved from Imperial Beach because he knew that sooner or later he was "going to get knocked out." Family members informed Franco that he was no longer welcome in Imperial Beach.

However, Franco occasionally went to Imperial Beach because his mother and other family members still lived there. Prior to Christmas 2001, Franco had been away from San Diego for a long time because he was working a construction job in El Centro. The job ended shortly before Christmas and he spent the holiday with his mother in Imperial Beach. On December 27, 2001, Franco was taking his cousin Megan Romero to her home in Imperial Beach when he saw Nissen and Mann standing on a street corner.<sup>3</sup> They were wearing clothing worn by Imperial Beach gang members. Mann and Nissen gestured at Franco to stop, but he ignored them and continued driving. After Franco dropped his cousin off at their grandmother's house, he drove back and saw Nissen at the

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<sup>3</sup> The reporter's transcript refers to Mann as "Cornell." However, this appears to be a transcribing error of Mann's gang moniker "Conejo."

same location. Nissen again motioned him to stop. Franco did not stop, but instead made a left turn and drove to his mother's house.

Nissen got in his car and followed Franco to his mother's house. Franco parked in front of his mother's house, although she was not home. After Franco parked, he called his girlfriend on his cell phone to tell her what was happening. As he was talking to his girlfriend, Nissen opened the passenger door of Franco's car and got inside.

Nissen asked Franco what he was doing there. Nissen stated that "Conejo" (Mann) had told Franco he was not supposed to be in Imperial Beach. Franco responded, "Who the fuck is Conejo to tell me not to visit my mother."

Nissen handed Franco a cell phone he was carrying. Mann was on the phone. Mann asked Franco about an old debt and told Franco to stay out of Imperial Beach. Franco denied that he owed any money. Mann told Franco to give his own cell phone to Nissen. Franco refused. Mann then told Franco to put Nissen back on the line.

Franco handed Nissen's cell phone back to him. Franco overheard Mann tell Nissen, "Just take his phone . . . ." Nissen ended the call and demanded that Franco give him his cell phone. Franco refused.

Nissen then hit Franco on the side of the head with his fist. Franco and Nissen then exited the car and began fighting in the street. Nissen punched Franco in the ribs three times, and Franco hit Nissen in the face, knocking him down. At that point, Franco noticed that Nissen had a knife in his hand and that the punches to his ribs were actually stabs. Franco saw that he was bleeding in the area of his ribs. He felt "real wet and kind of cold" and looked down and saw "blood all over." As Nissen got up, he said, "Oh,

you're dead." Nissen charged at Franco again, but Franco managed to get in his car and drive off.

Franco then saw that Nissen was following him in his own car. Franco was able to eventually lose Nissen. Franco drove to his grandmother's house. When he arrived, his mother and grandmother were there. When he pulled into the driveway and exited the car, he fainted. His mother asked him what happened. Franco told his mother he had been stabbed by some "homeboys" named "Curly" (Nissen) and "Conejo" (Mann). They called the police and paramedics, and Franco was transported to the hospital by ambulance. Franco sustained a four-inch deep wound to the right side of his torso, as well as a superficial puncture wound on his arm.

Carlos Farias, a gang unit detective with the San Diego County Sheriff's Department, testified that Nissen and Mann were members of the Imperial Beach street gang and went by the monikers of "Curly" and "Conejo," respectively. Mann was the primary Imperial Beach gang member enforcing the "keep-out-of-Imperial-Beach" rule.

Michael Speyrer, also a gang unit detective with the San Diego County Sheriff's Department, testified that the Imperial Beach gang is a documented street gang that has been in existence for nearly 50 years. The gang is primarily Latino, but a few members from other races are permitted. The gang has several subgroups or cliques, divided by age. The younger groups are the ones primarily responsible for committing crimes and gaining respect for the gang by instilling fear in people. Detective Speyrer testified that Nissen and Mann were documented members of the "Dukes" clique of the Imperial Beach gang.

Detective Speyrer stated that membership in the gang had to be earned either by being "jumped in" or backing up a gang member during a fight or crime. Members who did not earn their entry into the gang would not be trusted. Detective Speyrer stated that the Imperials have been involved in various types of crimes, including several homicides.

Detective Speyrer was familiar with the facts of this case from reading the reports and interviewing Franco. Detective Speyrer testified that in his opinion the charged crimes were gang related. He based his opinion in part on the fact that Franco had been "ranked out" of the gang because he left. Attacking a ranked-out member who returns to the neighborhood serves to "keep the rest of the members in line." Detective Speyrer's opinion was also based upon the fact that Mann claimed Franco owed him \$80 and directed Nissen to take his cell phone as payment. Assisting a fellow gang member collect on a debt is considered beneficial to the gang.

Nissen's codefendant Mann entered a plea of guilty to the charge of assault with a deadly weapon prior to trial. In his change of plea form, he admitted that he "aided and advised codefendant Nissen in an assault likely to produce great bodily injury by instigating and encouraging codefendant Nissen via telephone to take victim Franco's cell phone." The People called Mann as a witness at trial. However, Mann refused to testify, invoking his Fifth Amendment right against self-incrimination. Mann was declared an unavailable witness, and, over Nissen's Sixth Amendment confrontation clause objection, his change of plea form was admitted under the theory that it was a statement against penal interest.

## *B. Defense Case*

Officer Pedro Diaz of the Chula Vista Police Department was one of the first officers to arrive at the scene of the crime. Franco's mother told him that Franco had told her that he had been attacked by four Hispanic males.

Ericka Mancillas has been friends with Franco for about eight years. She lives around the corner from Franco's house and next door to Nissen. On December 27, between 2:00 and 3:00 p.m., she was walking home from a friend's house and Franco gave her a ride home. When Franco dropped her off at her house, Nissen was standing outside his house in the front yard, talking on his cell phone. Franco waved to Nissen and Nissen walked up to Franco's car. Nissen got in Franco's car, handed his cell phone to Franco, and said, "Rashad wants to talk to you." After Franco talked to Mann on the phone, he appeared to be upset. Franco said to Nissen, "You know what, you want to go for the F'ing money that I owe Rashad." Franco then sped away with Nissen still in the car and the passenger side door open.

Mancillas walked to the corner to see where Franco's car went. When the car stopped, Franco and Nissen got out of the car and began talking and moving their hands. She saw no fighting or weapons. After that, Nissen walked back down to Mancilla's house and they had pizza.

Nissen's cousin Maria Nissen was at Nissen's house on December 27. After Nissen arrived, they played video games in his room. He told Maria that he had been in an argument.

Nissen testified in his own defense. On December 27, Nissen first saw Franco when he was dropping off Mancillas at her house on the corner. When Franco drove by, Nissen was standing in his front yard talking to Mann on the telephone. Nissen told Mann that Franco had just driven by. Mann told Nissen that he wanted to talk to Franco.

Nissen walked over to Franco's car, which was in front of Mancilla's house, and told Franco that Mann wanted to talk to him. Nissen handed his cell phone to Franco and sat down on the passenger seat with his feet outside the open door. Franco spoke to Mann on the phone. After Franco was finished, he and Nissen argued about a debt. During the argument, Franco drove off with Nissen's door still open and his feet outside the car. Nissen pulled his feet inside and closed the car door. Franco drove around the corner, down the street, around another corner and stopped in front of Franco's mother's house. Franco drove in a reckless manner and kept reaching under the seat for something.

When they stopped in front of Franco's mother's house, Franco pulled out a knife and made a motion toward Nissen with it. Nissen tried to calm Franco down and Franco said, "I'm tired of this shit." As Franco faced Nissen and got closer, Nissen grabbed Franco's hand and Franco grabbed Nissen's neck. The two struggled back and forth, with the knife between them for a few seconds. Nissen managed to push Franco away and get out of the car. Franco got out of the car and came after Nissen. Nissen and Franco swung at each other outside the car and Franco then got back in his car and took off. Nissen never knew Franco had been stabbed as a result of the struggle.

## DISCUSSION

### I. *Admission of Change of Plea Form*

Nissen asserts that the court erred in allowing into evidence Mann's change of plea form because it violated his Sixth Amendment right to confront witnesses. In our original opinion, we concluded that admission of this evidence was not erroneous because it had "particularized guarantees of trustworthiness." However, we have been directed to reconsider that holding in our original opinion in light of the recent United States Supreme Court's decision in *Crawford, supra*, 124 S.Ct. 1354. We conclude that under *Crawford*, the court erred in admitting into evidence Mann's change of plea form. However, that decision does not require reversal because any error in allowing evidence of codefendant Mann's change of plea was harmless beyond a reasonable doubt.

"The Confrontation Clause of the Sixth Amendment, extended against the States by the Fourteenth Amendment, guarantees the right of a criminal defendant "to be confronted with the witnesses against him." The right of confrontation includes the right to cross-examine witnesses.'" (*People v. Fuentes, supra*, 61 Cal.App.4th at pp. 963-964, quoting *Richardson v. Marsh* ( 1987) 481 U.S. 200, 206.) "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.'" (*Lilly v. Virginia* (1999) 527 U.S. 116, 123-124 (*Lilly*), quoting *Maryland v. Craig* (1990) 497 U.S. 836, 845.) The against-penal-interest exception is not based on the assumption that the statements are without the typical dangers of hearsay, but founded on the assumption that "a person is unlikely to fabricate a statement against

his own interest at the time it is made.'" (*Lilly, supra*, 527 U.S. 116, 126-127, quoting *Chambers v. Mississippi* (1973) 410 U.S. 284, 299.) Although hearsay rules and the Confrontation Clause generally are designed to protect similar values, they are not totally congruent. A statement admissible under a hearsay exception may be prohibited from evidence by the confrontation clause. (*People v. Rios* (1985) 163 Cal.App.3d 852, 863; *Ohio v. Roberts* (1980) 448 U.S. 56, 66.) "[T]he veracity of hearsay statements is sufficiently dependable to allow the untested admission of such statements against the accused when (1) 'the evidence falls within a firmly rooted hearsay exception' or (2) it contains 'particularized guarantees of trustworthiness' such that adversarial testing would be expected to add little, if anything, to the statements' reliability." (*Lilly, supra*, 527 U.S. 116, 124-125, quoting *Ohio v. Roberts, supra*, 448 U.S. at p. 66.)

Declarations against penal interest define a large class of situations. Usual circumstances include admissions used against the declarant himself; exculpatory evidence offered by the defendant who claims the declarant committed the offense; and evidence offered by the prosecution to establish the guilt of an accomplice of the declarant. (*Lilly, supra*, 527 U.S. 116, 127.) Each of these circumstances involve different considerations, but generally the mere fact that an accomplice's admission qualifies as a statement against his penal interest does not justify its use as evidence against a third person under principals of the confrontation clause. (*Id.* at p. 128.) Further, "[a]ccomplices' confessions that inculcate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence." (*Id.* at p. 134.)

There is a presumption that accomplice' confessions that shift or spread the blame to a defendant at a criminal trial are unreliable and violate the Confrontation Clause. (*Lilly, supra*, 527 U.S. 116, 133-137.) However, in *Ohio v. Roberts, supra*, 448 U.S. 56, the United States Supreme court held that such statements could be admitted if they contain "particularized guarantees of trustworthiness" such that adversarial testing would be expected to add little, if anything, to the statements' reliability. (*Id.* at p. 66; *Lilly, supra*, 527 U.S. 125, 135.) "When a court can be confident . . . that 'the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility'" the statement is admissible. (*Lilly, supra*, 527 U.S. 136.) The *Crawford* decision, however, rejected this authority, holding that statements against penal interest were inadmissible even upon a showing that the hearsay was reliable.

In *Crawford* the defendant's wife was Mirandized and interrogated by police detectives in connection with the defendant's arrest for assault and attempted murder of a man who allegedly tried to rape her. (*Crawford, supra*, 124 S.Ct. at p. 1357.) The wife's tape-recorded statements to the police were played for the jury at trial, and the wife did not testify because of the state marital privilege. (*Id.* at pp. 1357-1358.) The trial court determined the tape-recorded statements could be played for the jury without running afoul of the confrontation clause, despite the defendant's inability to cross-examine the witness, because under the Supreme Court's previous decision in *Ohio v. Roberts, supra*, 448 U.S. 56, the wife's statements had "'adequate "indicia of reliability.'" (*Crawford, supra*, 124 S.Ct. at p. 1358.)

However, the Supreme Court in *Crawford* overruled *Ohio v. Roberts* to the extent it allowed admission of testimonial hearsay upon a showing the statement had "particularized guarantees of trustworthiness." In doing so, the high court noted that the confrontation clause "applies to 'witnesses' against the accused—in other words, those who 'bear testimony.' [Citation.] 'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' [Citation.] An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement." (*Crawford, supra*, 124 S.Ct. at p. 1364.)

The high court went on to reject the notion that confrontation clause concerns could be alleviated where the out-of-court testimonial hearsay had "particularized guarantees of trustworthiness": "Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.' . . . Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." (*Crawford, supra*, 124 S.Ct. at p. 1370.) Stated another way, "Dispensing with confrontation because testimony is obviously reliable is akin to

dispensing with a jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." (*Id.* at p. 1371.) The *Crawford* court held that out-of-court testimonial statements are deemed in violation of the confrontation clause, and hence inadmissible, unless the witness is unavailable and there was a prior opportunity for cross-examination. (*Id.* at p. 1374.)

The Supreme Court did not define what constitutes "testimonial" hearsay. (*Crawford, supra*, 124 S.Ct. at p. 1374.) The court did, however, hold the term "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Ibid.*) The Supreme Court also distinguished nontestimonial hearsay from testimonial hearsay for the purpose of its analysis of the confrontation clause: "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does [*Ohio v.*] *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." (*Crawford, supra*, 124 S.Ct. at p. 1374.)

Application of *Crawford* to this case requires that we find the court's allowance into evidence of the change of plea form of his codefendant Mann to be error. Indeed, neither side disputes that it constitutes "testimonial hearsay" subject to the *Crawford* decision.<sup>4</sup> Therefore, allowance of the change of plea form without Mann being subject to cross-examination violated Nissen's confrontation rights.

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<sup>4</sup> After the transfer of this matter from the California Supreme Court, neither side elected to brief the application of *Crawford* to admission of Mann's change of plea form.

However, this error does not require reversal of the judgment because the admission of Mann's statement was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.) The factual basis in Mann's change of plea form stated: "[I] aided and advised codefendant Nissen in an assault likely to produce great bodily injury by instigating and encouraging codefendant Nissen via telephone to take victim Franco's cell phone." That statement was only relevant to prove the attempted robbery charge against Nissen. The statement supports the theory that Nissen intended to steal Franco's cell phone. However, Nissen was acquitted of that charge. With respect to the offenses of which Nissen was convicted (assault with a deadly weapon and battery with serious bodily injury), Franco's testimony and the other evidence presented at the trial supplied substantial independent evidence that is more than sufficient to convict Nissen of those charges. Mann's statement neither corroborates nor contradicts this testimony. Further, the court allowed in evidence the probation report, in which Mann recanted the statement contained in his change of plea form, thereby diminishing the evidentiary weight of the statement. Thus, the admission of Mann's statement, although erroneous, does not require us to reverse the judgment in this case.

## II. *Sufficiency of Evidence That Crimes Were "Gang Related"*

Nissen asserts that there is insufficient evidence to support the criminal street gang enhancement as there was no showing that the crimes were committed for the benefit of a criminal street gang. This contention is unavailing.

### A. *Standard of Review*

In reviewing the sufficiency of the evidence, "the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' to support the trial court's findings." (*Estate of Leslie* (1984) 37 Cal.3d 186, 201.)

### B. *Analysis*

Section 186.22, subdivision (b)(1) provides in part:

" . . . [A]ny person who is convicted of a felony *committed for the benefit of, at the direction of, or in association with any criminal street gang*, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows: [¶] . . . [¶] (C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years." (Italics added.)

Here, contrary to Nissen's assertion, substantial evidence supports the criminal street gang enhancement. Franco was not welcome in Imperial Beach because he left the Imperials gang. He had been told through family members that he was not safe there. On the date of the crimes both Nissen and Mann indicated to Franco that he was not welcome in Imperial Beach. Thereafter, Nissen attacked Franco. As the People's gang expert testified, beating or attacking a "ranked out" member that reenters the neighborhood benefits the gang because it keeps "the rest of the members in line."

Further, to the extent the attack was as a result of a perceived debt owed by Franco to Mann, the attack was either at the direction of, or for the benefit of, the gang. Mann

instructed Nissen to take Franco's cell phone. When Franco refused, Nissen attacked him. Thus, the attack was at the direction of another gang member. Further, the People's gang expert testified that assisting another gang member in the collecting of a debt served to benefit the gang. Substantial evidence supports the criminal street gang enhancement.

### III. *Instruction Under CALJIC No. 17.24.2*

Nissen contends that the court improperly instructed the jury on the criminal street gang enhancement because it did not state that the jury must find that the appellant had the specific intent to promote, further or assist the criminal activities of the gang. This contention is unavailing.

The court instructed the jury under CALJIC No. 17.24.2 as follows:

"It is alleged in Counts 1, 2 and 3 of the Information that the charged felony was committed for the benefit of, at the direction of, or in association with a criminal street gang *with the specific intent to promote, further, or assist in any criminal conduct by gang members*. [¶] . . . [¶] In order to prove this allegation, each of the following elements must be proved: [¶] 1. The crimes charged were committed for the benefit of, at the direction of, or in association with a criminal street gang; and [¶] 2. These crimes were committed *with the specific intent to promote, further, or assist any criminal conduct by gang members*." (Italics added.)

Although Nissen acknowledges that CALJIC No. 17.24.2 did require that the jury find the crimes were committed with the specific intent to promote, further or assist criminal conduct by gang members, he asserts that it is deficient because it does not specifically state that *Nissen* had to have that specific intent. However, Nissen was the only defendant standing trial and the only person charged with these crimes. He was the direct perpetrator of these crimes. Therefore, it would be obvious to any juror that the

specific intent referred to was Nissen's. Nissen's challenge to the court's instruction under CALJIC No. 17.24.2 is unavailing.

#### IV. *Instruction Under CALJIC No. 17.41.1*

Nissen contends the court erred by instructing the jury under CALJIC No. 17.41.1. Nissen asserts that this instruction impermissibly infringed on his federal and state constitutional rights to a fair trial by eroding the privacy and secrecy of jury deliberations, thereby chilling the free exchange of jurors' views and their independent judgment, and pressuring minority jurors to acquiesce in the views of the majority jurors. We reject these contentions.

The court instructed the jury under CALJIC No. 17.41.1 (1998 New) (6th ed. 1996) as follows:

"The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the court of the situation."

The issue of the constitutionality of CALJIC No. 17.41.1 was decided by the California Supreme Court on July 18, 2002, in the case *People v. Engelman* (2002) 28 Cal.4th 436 (*Engelman*). In that case, the court concluded that CALJIC No. 17.41.1 "does not infringe upon [a] defendant's federal or state constitutional right to trial by jury or his state constitutional right to a unanimous verdict . . . ." (*Engelman, supra*, at pp. 439-440.) Nevertheless, the high court also held that "CALJIC No. 17. 41.1 should not California Constitution, or other state law) requires absolute and impenetrable secrecy for

jury deliberations in the face of an allegation of juror misconduct, or that the constitutional right constitutes an absolute bar to jury instructions that might induce jurors to reveal some element of their deliberations." (*Ibid.*) "[A] juror is required to apply the law as instructed by the court, and refusal to do so during deliberations may constitute a ground for discharge of the juror. [Citation.] Refusal to deliberate also may subject a juror to discharge [citation], even though the discovery of such misconduct ordinarily exposes facts concerning the deliberations, if, after reasonable inquiry by the court, it appears 'as a "demonstrable reality" that the juror is unable or unwilling to deliberate.' [Citation.]" (*Id.* at pp. 443-444, italics omitted.)

The court also rejected the defendant's claim that instructing the jury under CALJIC No. 17.41.1 violated his right to a unanimous jury verdict and to the independent and impartial decision of each juror because "[t]he instructions as a whole fully informed the jury of its duty to reach a unanimous verdict based upon the independent and impartial decision of each juror." (*Engelman, supra*, 28 Cal.4th at p. 444.) The court also found that the giving of CALJIC No. 17.41.1 was not overly coercive to deadlocked juries or a holdout juror, as it "is not directed at a deadlocked jury and does not contain language suggesting that jurors who find themselves in the minority, as deliberations progress, should join the majority without reaching an independent judgment. The instruction does not suggest that a doubt may be unreasonable if not shared by a majority of the jurors, nor does it direct that the jury's deliberations include such an extraneous factor." (*Engelman, supra*, at pp. 444-445.)

However, after rejecting the defendant's constitutional claims, the high court went on to criticize CALJIC No. 17.41.1 as unnecessary and creating at least a risk of the type of problems the defendant highlighted : "There is risk that the instruction will be misunderstood or that it will be used by one juror as a tool for browbeating other jurors. The instruction is given immediately before the jury withdraws to commence its deliberations and, unlike other instructions cautioning the jury against misconduct such as visiting the scene of the crime or consulting press accounts, it focuses on the process of deliberation itself. We believe it is inadvisable and unnecessary for a trial court to create the risk of intrusion upon the secrecy of deliberations or of an adverse impact upon the course of deliberations by giving such an instruction." (*Engelman, supra*, 28 Cal.4th at p. 445.) The court also noted that juries are already given adequate instructions that guard against juror misconduct and explain the jury's duty to follow the law as given in the instructions . (*Id.* at pp. 448-449.) Therefore, the court concluded that while CALJIC No. 17.41.1 was not constitutionally infirm, in the future courts are directed not to instruct juries with this provision. (*Engelman, supra*, at p. 449.)

Based upon this direction from the California Supreme Court, we must also conclude that CALJIC No. 17.41.1 is not constitutionally infirm. The court thus did not err in instructing the jury under this provision in the instant case.

Further, even if it had been improper for the court to instruct the jury under CALJIC No. 17.41.1, any such error would have been harmless beyond a reasonable doubt. No juror was reported to the court by another juror. There is no evidence any juror was coerced or pressured. There is no evidence that any juror refused to follow the

law. Because there is no evidence "that CALJIC No. 17.41.1 had any effect on this case whatsoever," any error by the court in instructing the jury under CALJIC No. 17.41.1 did not constitute reversible error. (*People v. Brown* (2001) 91 Cal.App.4th 256, 271; *People v. Molina* (2000) 82 Cal.App.4th 1329, 1335.)

#### DISPOSITION

The judgment is affirmed.

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NARES, J.

WE CONCUR:

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HUFFMAN, Acting P. J.

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AARON, J.